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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1296

SHERMAN H. CROUSE, Warden, Kansas State Penitentiary, Lansing, Kansas,
Petitioner,

vs.

ARLEY C. BROWNING,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH JUDICIAL CIRCUIT

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INDEX

Opinions Below 2
Jurisdiction 2
Question Presented 2
Constitutional Provision Involved 2
Statutory Provisions Involved 2
Statement of the Case 3
Reasons Certiorari Should Be Granted 4
Conclusion 7
Appendix A, Opinion of the United States Court of Appeals for the Tenth Circuit A1
Appendix B, Findings of Fact and Conclusions of Law of the United States District Court for the District of Kansas A6
Appendix C, Constitutional and Statutory Provisions Involved A14
Appendix D, Portions of Court File from the District Court of Pawnee County, Oklahoma A15
Appendix E, Affidavit of Horace D. Ballaine A20

TABLE OF CASES

Gray v. *Johnson*, 354 F.2d 986 (1965) 6
Hawk v. *Olson*, 326 U.S. 276, 279 5
Johnson v. *Zerbst*, 304 U.S. 458, 468, 469 4
McKinney v. *United States*, 208 F.2d 844 (D.C. Cir. 1953) 6
Moore v. *Michigan*, 355 U.S. 155, 161, 162 5
Powell v. *Alabama*, 287 U.S. 45 4
Stack v. *Bomar*, 354 F.2d 200 (6th Cir., 1965) 6
United States ex rel. Brennan v. *Fay*, 353 F.2d 56 (1965) 6

United States v. *Russell*, 146 F. Supp. 102 (S.D. N.Y., 1955), affirmed 238 F.2d 605 (2d Cir., 1956) 5

CONSTITUTION AND STATUTES

Constitution of the United States, Fourteenth Amendment 2
Kansas Statutes Annotated 21-107a 2
21 Oklahoma Statutes Annotated § 801 ..... 2, 4
22 Oklahoma Statutes Annotated § 464 ..... 2, 4
Rule 19(1)(b) of the Supreme Court 2
Rule 52(a) of the Federal Rules of Civil Procedure 5
28 U.S.C., Sec. 1254 (1) 2

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH JUDICIAL CIRCUIT

Petitioner respectfully requests that this Court grant a writ of certiorari to review the portion of the decision of the United States Court of Appeals for the Tenth Judicial Circuit entered in this case on February 9, 1966, in which the court of appeals determined that the respondent's prior conviction in the State of Oklahoma was invalid.

OPINIONS BELOW

The opinion of the United States Court of Appeals in this case is not yet reported but is reproduced as Appendix A. The findings of fact and conclusions of law of the United States District Court for the District of Kansas in this case are not reported but are reproduced as Appendix B.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. Sec. 1254 (1) and Rule 19(1)(b) of this Court.

QUESTION PRESENTED

In determining the validity of a prior conviction, is a federal district court entitled to rely upon the affidavit of the trial judge and the trial court minutes showing waiver of counsel, or must it as a matter of law accept the habeas corpus petitioner's uncorroborated testimony that he did not waive counsel?

CONSTITUTIONAL PROVISION INVOLVED

The constitutional provision involved in this case is Section 1 of the Fourteenth Amendment to the United States Constitution. This is reproduced as a portion of Appendix C.

STATUTORY PROVISIONS INVOLVED

Statutory provisions involved in this case are Kansas Statutes Annotated 21-107a and 21 Oklahoma Statutes Annotated § 801, and 22 Oklahoma Statutes Annotated § 464. These are reproduced as a portion of Appendix C.

STATEMENT OF THE CASE

The case below originated in the United States District Court for the District of Kansas on a petition by the respondent for a writ of habeas corpus in which he contested the validity of his confinement in the Kansas State Penitentiary under five concurrent sentences imposed on January 2, 1957, by the District Court of Sedgwick County, Kansas. These sentences were imposed after respondent's conviction of four counts of robbery in the first degree and one count of attempted robbery in the first degree. During that jury trial and on direct appeal, the respondent was represented by retained counsel. Respondent's sentences were one term of life imprisonment and four terms of fifteen years. These sentences were based on the fact that the State, after conviction, alleged and offered evidence proving the fact that the respondent had previously been twice convicted of felonies.

At the time of the hearing in this case, the district court received into evidence the files of a prior habeas case in which the respondent had been given a full hearing on the question of validity of the Oklahoma and Missouri prior convictions. In the previous case, the district judge had concluded that the Missouri conviction was invalid because of the age of the respondent and of the failure of the Missouri trial court to advise respondent of his right to counsel as reflected by that court's records.

The district court had previously determined, as it did in this case, that the Oklahoma conviction was valid. The district court found that the respondent had been advised of his right to appointed counsel by the Oklahoma court. The evidence introduced on the question of the waiver of the right to counsel, in addition to respondent's testimony, included the complete court file from the District Court of Pawnee County, Oklahoma (four portions of which are

reproduced as Appendix D), reflecting that on at least two occasions the respondent was advised of his rights, and the affidavit of the former Oklahoma judge that he invariably offered court-appointed counsel to indigents (Appendix E). Additionally, the district court had before it the transcript of testimony in the District Court of Sedgwick County, Kansas, which included the testimony of the respondent concerning his two prior convictions (Certified Record, Ex. F, pp. 462-469). The respondent's testimony before the district court is contained in the certified record (Tr. #3401 H.C., pp. 34-43). The district court concluded that the respondent had been advised of his right to counsel in the Oklahoma proceeding, that he had waived that right, and that, accordingly, the Oklahoma conviction was valid. On appeal by the respondent, the United States Court of Appeals reversed that portion of the district court's decision.

REASONS CERTIORARI SHOULD BE GRANTED

At the time the respondent stood before the court in Oklahoma, he was charged with a capital offense (21 Oklahoma Statutes Annotated § 801). Under *Powell* v. *Alabama*, 287 U.S. 45, the respondent had a right to counsel. Additionally, under 22 Oklahoma Statutes Annotated § 464, any indigent person standing charged with a felony in the State of Oklahoma had a right to court-appointed counsel. The evidence presented to the district court satisfied it that the Oklahoma court accorded the respondent that right, his uncorroborated version of the facts notwithstanding. Nevertheless, the circuit court apparently concluded that as a matter of law the record was not sufficient to overcome the uncorroborated testimony of the respondent.

In *Johnson* v. *Zerbst*, 304 U.S. 458, 468, 469, this Court held that when collaterally attacked, a judgment of a court carries a presumption of regularity; that the burden of

proving nonexistence of a waiver of counsel rests on the person seeking relief from the judgment under habeas corpus; and that this burden is only met by a preponderance of the evidence. In *Moore* v. *Michigan*, 355 U.S. 155, 161, 162, the burden of proving nonwaiver of counsel was held to be on the person attacking a conviction. In *Hawk* v. *Olson*, 326 U.S. 276, 279, this Court held that even an uncontradicted assertion by a witness did not have to be accepted, but that the question of the credibility of the witness was still open for the trier of fact. Rule 52(a) of the Federal Rules of Civil Procedure provides that the district court will not be reversed on a finding of fact unless that finding is clearly erroneous, i.e., unless there is no substantial evidence to support the result. Petitioner believes that the court of appeals ignored these principles in overruling the determination of the district court. In fact, it appears that the court of appeals has determined that as a matter of law, the respondent had to be believed by the district court even though that court had the respondent before it, could observe his demeanor, and could compare his testimony with the court records and previous transcripts available to that court.

In its determination of this particular record, the Tenth Circuit Court of Appeals appears to be applying a different standard for determining the evidence necessary to uphold a conviction than that which is followed in at least three other circuits.

In *United States* v. *Russell*, 146 F.Supp. 102 (S.D.N.Y., 1955), affirmed 238 F.2d 605 (2d Cir., 1956), a writ of error *coram nobis* was denied on less substantial evidence of waiver than is present here. That district court stated, at page 103 of 146 F.Supp., that the fact that there was no direct evidence to counter the petitioner's testimony did not require the court to accept the testimony as true, but that the court had the right to discredit the testimony.

Furthermore, the second circuit held, in the case of *U. S. ex rel. Brennan* v. *Fay*, 353 F.2d 56 (1965), that the burden of preponderance was not satisfied by the uncorroborated testimony of a habeas petitioner.

Similar opinions were delivered by the sixth circuit in *Stack* v. *Bomar*, 354 F.2d 200 (6th Cir. 1965), and *Gray* v. *Johnson*, 354 F.2d 986 (1965). In the latter case, that court applied the rules that petitioner must sustain his position by a preponderance of the evidence; that the district court should not be reversed unless clearly erroneous; and that the district court may additionally disbelieve the uncorroborated testimony of a habeas corpus petitioner regarding a fact situation similar to the one in this case, and affirmed a district court determination denying the requested writ. A factor noted in that case was the delay of that petitioner in presenting his complaint, which delay is also present in this case. The respondent served the full term of his Oklahoma sentence and did not attempt to attack its validity until some time after it had been used to increase his Kansas sentence. His first attempt to contest or set aside the Oklahoma sentence was not a direct appeal but was a petition for a writ of error *coram nobis* which he filed while in the custody of the Warden of the Kansas State Penitentiary. Petitioner emphasizes that the respondent made no objection to introduction of the record of the Oklahoma conviction in his trial in Sedgwick County, Kansas, other than one directed to the foundation for the actual papers offered. Petitioner believes that the district court could take this into account in determining the credibility of the respondent's testimony. The fact that court minutes may be interpolated in ascertaining what in fact took place is indicated by *McKinney* v. *United States*, 208 F.2d 844 (D.C. Cir. 1953). However, this is apparently rejected by the Tenth Circuit Court of Appeals.

This question is an important one meriting a determination by this Court because of the large number of

habeas corpus petitioners who have been sentenced as habitual criminals and who choose to attack their prior convictions years after imposition, often after the other principals have died or can no longer truthfully remember the details. Under these circumstances, the lower federal courts need guidance on the amount of evidence necessary to substantiate or strike these prior convictions and upon the credence which district courts must give to the uncorroborated testimony of habeas corpus petitioners.

CONCLUSION

The petition for writ of certiorari to the United States Court of Appeals for the Tenth Judicial Circuit should be granted in this case for two reasons. First, the court of appeals erroneously failed to apply principles of law as announced by this Court in reversing the United States District Court for the District of Kansas on its determination of the fact question of waiver of the right to counsel in the respondent's Oklahoma conviction. Second, the Tenth Circuit Court of Appeals appears to be at variance and in conflict with the Second, Sixth, and District of Columbia Circuit Courts on the right of a district court to discredit the testimony of a habeas petitioner and upon the amount of evidence necessary to sustain a factual determination of waiver by a district court.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 8191 - JANUARY TERM, 1966

ARLEY C. BROWNING, Appellant, v. SHERMAN H. CROUSE, Warden, Kansas State Penitentiary, Lansing, Kansas, Appellee.	Appeal from the United States District Court for the District of Kansas

Jordan Hochstadt for Appellant.

Richard H. Seaton, Assistant Attorney General (Robert C. Londerholm, Attorney General of Kansas, and Park McGee, Assistant Attorney General of Kansas, on the brief), for Appellee.

Before LEWIS, BREITENSTEIN and HILL, Circuit Judges.

BREITENSTEIN, Circuit Judge.

The district court denied habeas corpus relief to appellant Browning, a prisoner in the Kansas State Penitentiary. Our concern is with a life sentence as an habitual criminal.[1]

1. G.S.Kan. 1949, §§ 21-107a and 21-109. See also State v. Liebeno, 163 Kan. 421, 183 P.2d 419, 423. The district court held that three sentences for first degree robbery were invalid under Kansas law. Neither party attacks that determination and in any event such 15-year sentences have been served.

In January, 1957, after a jury trial, Browning received a variety of sentences all of which have been served except the life term. He unsuccessfully appealed from his conviction and thereafter made many attempts to secure post-conviction relief in both state and federal courts.[2]

On his first appeal to this court[3] we rejected the claim that the life term was invalid because of procedural deficiencies. On his second appeal[4] Browning asserted that the two prior felony convictions on which the habitual criminal charge was based were void because of constitutional defects. We declined to consider the point because other sentences had not been served.

After our second decision, Browning filed a petition in state district court for relief under K.S.A. § 60-1507, the state's equivalent of 28 U.S.C. § 2255. The state court held that the two prior felony convictions were valid and that the sentences were proper. The pending habeas petition was then presented to the federal district court. A hearing was held at which all parties relied on the record made in previous federal habeas proceedings.

The two felony convictions relied on to sustain the habitual criminal charge were a 1943 Missouri conviction for robbery and a 1950 Oklahoma conviction for armed robbery. The district court held that the Missouri conviction was void because Browning, then 17 years old, was not represented by counsel.[5] The warden does not attack this determination. The court upheld the Oklahoma conviction, finding that the appellant had been advised of his right to counsel. On the basis of the validity of the

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2. These are listed in our opinion in Browning v. Crouse, 10 Cir., 327 F.2d 529.

3. Browning v. Hand, 10 Cir., 284 F.2d 346, certiorari denied 369 U.S. 821.

4. Browning v. Crouse, 10 Cir., 327 F.2d 529.

5. See Gideon v. Wainright, 372 U.S. 335.

Oklahoma conviction the court concluded that Browning was subject to sentence as a second offender to a term of 24 to 42 years;[6] that the excessive portion of the sentence was severable from a proper sentence; and that Browning was not entitled to release.[7]

In the Oklahoma case appellant pleaded guilty to a charge of robbery with a firearm punishable by death or imprisonment.[8] The right of an accused in a capital case to have the aid of counsel is guaranteed by the Fourteenth Amendment.[9] This right is also assured by the Oklahoma statutes.[10] Appellant testified unequivocally that he had not been advised of his right to counsel and had not been afforded counsel. To rebut this the warden presented a certified copy of the Oklahoma court docket and an affidavit by the sentencing judge. The only pertinent docket entry reads:

> "Deft. each present in court [Browning was charged jointly with one Snyder] in person, duly arraigned and advised of their rights and each enter his plea of not guilty."

The affidavit concludes thus:

> "As I said above, I have no independent recollection of Mr. Browning's case. It is my opinion, however, that I did advise him of his right to counsel for I can remember no case in which I did not follow such procedure."

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6. G.S.Kan. 1949, § 21-107a.

7. Browning's potential release date from a 20 to 42-year sentence is June 19, 1981.

8. O.S. 1941, § 21-801.

9. Powell v. Alabama, 287 U.S. 45, 68-71.

10. O.S. 1941, § 22-464.

The question is whether a docket entry referring generally to "rights" without specifying what rights and an affidavit stating a practice are sufficient to sustain the district court's finding that the appellant was "advised of his constitutional rights and his right to be represented by counsel." We believe that it is not. Appellant's testimony was positive and unimpeached by cross-examination. The indefinite and inconclusive showing made by the warden casts only a conjectural and insubstantial doubt on its verity. The testimony "may not be disregarded, even though adduced from interested witnesses, and no question of credibility or issue of fact is presented for determination" by the trier of the facts.[11] The situation is either that Browning was not properly advised of his constitutional and statutory rights in the Oklahoma proceedings or that the Oklahoma court did not keep a complete record of those proceedings. When a record fails to show affirmatively that the required safeguards are provided, their existence may not be inferred from a general statement of a practice. Even if Browning was advised of his right to counsel, nothing in the record, and no finding by the district court, establishes that he knowingly and voluntarily waived that right. In our opinion the Oklahoma conviction was void and subject to collateral attack in the federal habeas proceedings.

Because of the invalidity of the habitual criminal sentence, the robbery charge on which it was based must be considered as a first offense, the term for which is 10 to 21 years.[12] The life term is separable from the permissible statutory term of years. The sentencing court had jurisdiction over the person of Browning and over the

11. Nicholas v. Davis, 10 Cir., 204 F.2d 200, 202. See also Potucek v. Cordeleria Lourdes, 10 Cir., 310 F.2d 527, 531, certiorari denied 372 U.S. 930.

12. G.S.Kan. 1949, §§ 21-527 and 21-530.

offense. In United States v. Pridgeon, 153 U.S. 48, 62, the Supreme Court said:

> "* * * the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but only leaves such portion of the sentence as may be in excess open to question and attack."

Kansas has recognized this principle. In Loftis v. Amrine, 152 Kan. 464, 105 P.2d 890, it was held that the imposition of a 20-year sentence when the statute violated prescribed a sentence not to exceed 10 years did not result in a void sentence. Our own decisions are in accord.[13]

The district court found that the potential release date for Browning on a 21-year sentence would be April 19, 1969. It follows that the present detention of Browning is lawful and he is not entitled to habeas relief.[14]

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13. See McKinney v. Finletter, 10 Cir., 205 F.2d 761, 763; and Fields v. Hunter, 10 Cir., 167 F.2d 547, 548.

14. McNally v. Hill, 293 U.S. 131, 139.

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

ARLEY C. BROWNING, Petitioner, vs. SHERMAN H. CROUSE, Warden Kansas State Penitentiary, Lansing, Kansas, Respondent.	No. 3723 H.C.

Findings of Fact and Conclusions of Law

The above entitled cause came on regularly for trial and the Court having duly considered the evidence and being fully advised in the premises now finds the following:

FINDINGS OF FACT

1. In September 1943 Petitioner, Arley C. Browning was arrested and charged with the crime of robbery in Phelps County, Missouri. At that time he was 17 years of age. He entered a plea of guilty to the charge and was sentenced to the Algoa Reformatory at Algoa, Missouri for a term of five years. He was not afforded counsel to advise him and it does not appear that he was ever advised of his constitutional rights at the time of his conviction or prior thereto. The sentence assessed against him has been served.

2. On April 17, 1950 the Petitioner was charged with the crime of robbery with firearms by Information filed in the County Court of Pawnee County, Oklahoma. Upon arraignment he entered a plea of not guilty. On

May 22, 1950 in open court he withdrew his plea of not guilty and entered a plea of guilty and was sentenced by the Judge of the District Court for Pawnee County, Oklahoma to serve 10 years in Oklahoma State Prison at McAlester, Oklahoma. This sentence the Petitioner served. Petitioner was then 24 years of age. Petitioner was never represented by counsel at any stage of the proceeding before the Oklahoma District Court. He was, when he appeared before the District Court to withdraw his plea of not guilty and enter a plea of guilty, advised of his constitutional rights and his right to be represented by counsel. Appointment of counsel was not requested, his plea of guilty was accepted by the Court and sentence thereafter imposed. He was at the time notified by the Court of his right to appeal. The right to appeal was not requested by Petitioner at that time. Petitioner served the sentence imposed. The crime charged against Petitioner in Oklahoma as defined by Sec.21-801 Oklahoma Statutes of 1941 was a capital offense for which Petitioner could have received a death penalty. At the time of the proceeding in the case in Oklahoma Sec.22-464 Oklahoma Statutes 1941 provided that the Court must inquire of defendants who appear without counsel if they desire the aid of counsel and if they so desire and are unable to employ counsel, the Court must assign counsel to them.

3. In February 1956 Petitioner was arrested and charged, under the provisions of G.S.Kansas, 1955 Supp. 21-2611, in the District Court of Sedgwick County, Kansas, in an Information containing two counts, with having in his possession and control a revolver after having been previously convicted of armed robbery constituting a felony in 1950 in the State of Oklahoma. Another Information filed at about the same time charged defendant with having committed robbery in the first degree in four separate counts, and a fifth count charged him with

attempted robbery. On application of the State, and because of the provisions of G.S.Kans. 62-1449 the Court directed the consolidation of these two Informations for trial over Petitioner's objection. At a trial before a jury in which Petitioner was represented by retained counsel, the jury convicted Petitioner on all seven counts charged in the two Informations. During the course of the trial, the Petitioner took the witness stand and on direct examination by his own retained counsel, testified to the fact of the two prior convictions.

4. On January 2, 1957 defendant was brought before the District Court of Sedgwick County, Kansas for sentence. The state submitted certified copies of Journal Entries of Conviction of robbery in Phelps County, Missouri in the year 1943 and of his conviction of armed robbery in Pawnee County, Oklahoma in 1950, and it was then determined by the Court that having been convicted of two prior felonies Petitioner should be sentenced under the Habitual Criminal Act of Kansas. Petitioner was then sentenced to life imprisonment on one count of the Information which had charged him with first degree robbery. On each of the other three first degree robberies and the attempted first degree robbery charge, Petitioner was sentenced to serve 15 years on each count, and on the two counts charging him with violating the firearms law of Kansas, he was sentenced to serve not less than one, nor more than five years; all of such sentences were directed to run concurrently. No objection was interposed by the Petitioner to the admission in evidence of the records of conviction at the time of Petitioner's sentence.

5. Petitioner appealed his conviction to the Supreme Court of the State of Kansas, which Court, on January 25, 1958 affirmed the conviction on each and every count upon which Petitioner was tried, and determined that there was

no prejudice to the defendant's substantial rights. (*State* v. *Browning*, 182 Kan. 244, 320 P.2d 844.)

6. At the trial of Petitioner upon the charges filed in the Sedgwick County, Kansas District Court, the State introduced in evidence to sustain the charge that Petitioner had violated the Kansas Firearms Act (G.S. 1949, 21-2611) a certified copy of the record of conviction of Petitioner in the District Court of Pawnee County, Oklahoma in the year 1950. The only objection offered by Petitioner to this record of conviction was that it had not been properly identified and no proper basis had been laid for its introduction. This objection was the only objection made against the introduction of the record of conviction by the Petitioner at the trial.

7. Thereafter Petitioner filed in the Supreme Court of the State of Kansas a petition for a Writ of Habeas Corpus against the Warden of the Kansas State Penitentiary. There he claimed that the Sedgwick County, Kansas District Court had committed error in consolidating for trial the two Informations filed against him; that one of the Informations was defective in that it was vague and indefinite; that his rights were violated because he was not proceeded against by Indictment instead of Information; that the Habitual Criminal Act of Kansas was unconstitutional, and finally that the Journal Entry record of his conviction was defective in that it failed to contain recitals of the details of his former convictions as provided by the Kansas statute applicable. Upon full hearing of this Petition, the Supreme Court of Kansas on March 7, 1959 denied the application of Petitioner which decision is reported in 184 Kan. 365, 366, P.2d 409.

8. Thereafter Petitioner filed a Petition for a Writ of Habeas Corpus in the United States District Court for the District of Kansas in which the Warden of the

Kansas State Penitentiary was Respondent. In that proceeding the petitioner claimed that he was denied due process of law because he was not given adequate notice that the provisions of the Kansas Habitual Criminal statutes were to be invoked against him as the statute required. This, the Court found was the first time such contention had been raised. No contention was made at that time that the two prior convictions were void for any reason, and the Tenth Circuit Court of Appeals in its decision entered October 9, 1960 affirmed the decision of the United States District Court for the District of Kansas discharging the Writ and denying relief to Petitioner. (*Browning* v. *Hand*, 284, F.2d 346.)

9. On December 10, 1962 Petitioner filed a petition in the United States District Court for the District of Kansas in which he claimed that he was wrongfully tried and convicted in the Sedgwick County District Court for the reason that his conviction in Phelps County, Missouri was unconstitutional and void, and furthermore that his conviction in the Pawnee County District Court of Oklahoma was unconstitutional and void because he was not afforded legal counsel in both instances, in violation of his constitutional rights, and for this reason such convictions could not be used in the prosecution against him under the Kansas Firearms Act, nor could they be used against him as a basis for sentence under the Kansas Habitual Criminal Act. This Court, in denying the requested relief made extensive findings of fact and conclusions of law in that proceeding, No. 3401 H.C. The United States Court of Appeals for the Tenth Judicial Circuit affirmed the decision. (Browning v. Crouse, 327 F.2d 529.)

10. On February 25, 1964, the Petitioner filed in the District Court of Sedgwick County, Kansas, a motion to vacate the judgment and sentence in the state of criminal

action. That court appointed counsel to represent the Petitioner. On the 27th of April, 1964, the District Court of Sedgwick County, Kansas, held a hearing on the Petitioner's motion. The Petitioner was not present in person but was represented by his court-appointed counsel. That court made extensive findings of fact and conclusions and ruled adversely to the Petitioner. The Petitioner has never attempted to appeal from that ruling.

11. Under the present rules of the Kansas Board of Probation and Parole, the following are the minimum times required to serve the respective sentences.

(a) 15 year sentence requires at least 8 years and 1 month of confinement.

(b) 10-21 year sentence requires at least 12 years and 5 months of confinement.

(c) 20-42 year sentence requires at least 24 years and 8 months of confinement.

These times may be extended by disciplinary action for rules violations.

12. The present rules of the Kansas Board of Probation and parole are more favorable to a prisoner than was the method of time computation in effect in January 1957.

13. A person confined in the Kansas penal institution may earn additional "incentive" credits which will reduce on the length of time he must serve in the institution. At the time of this hearing, the Petitioner had earned 44 days of "incentive" credit.

14. On January 2, 1965 the Petitioner had served 8 years in confinement under the sentences imposed by the District Court of Sedgwick County, Kansas.

15. Under present computations, the Petitioner's potential release dates are as follows:

(a) on a 15 year sentence, October 18, 1965,

(b) on a 21 year sentence, April 19, 1969,

(c) on a 42 year sentence, June 19, 1981.

There is no release date applicable to a life sentence in Kansas.

16. The Petitioner has exhausted his state remedies.

CONCLUSIONS OF LAW

From the foregoing facts the Court concludes:

1. The District Court of Sedgwick County, Kansas, had jurisdiction of the Petitioner and of the offenses with which he was charged.

2. Nothing occurred during the course of trial which would divest that court of its jurisdiction.

3. Under Kansas law, the trial court had the authority to impose the following sentences:

(a) On a first offender:

(I) For a violation of G.S.Kansas, 1949, 21-527; confinement and hard labor for a term of not less than 10 nor more than 21 years. The court could not elect a term of years between 10 and 21 years in length. (G.S.Kansas, 1949, 21-530; G.S.Kansas, 1961 Supp., 62-2239.)

(II) For an attempt to violate G.S.Kansas, 1949, 21-527; confinement and hard labor for a term of not less than 5 nor more than 10 1/2 years. (G.S.Kansas, 1949, 21-101.)

(III) For a violation of G.S.Kansas, 1961 Supp., 21-2611; imprisonment for a term not exceeding 5 years.

(b) Upon a proof of one prior conviction, the Court was obligated to impose a sentence twice the length of

that authorized for each substantive crime except the gun violators. (G.S.Kansas, 1949, 21-109.)

4. The 1943 Missouri conviction was obtained in violation of Petitioner's rights guaranteed under the Constitution of the United States. It is, therefore, void and subject to collateral attack at any time that it serves as a basis for confinement of the Petitioner.

5. The 1950 Oklahoma conviction was obtained in accordance with the Petitioner's rights guaranteed under the Constitution of the United States. It is a valid judgment.

6. That portion of the sentence imposed by the District Court of Sedgwick County, Kansas, on count one of the Information in Case No. A-59694 which exceeds a maximum term of 42 years is excessive and void. The 15 year sentences were not authorized by Kansas law for a second conviction upon the substantive crimes charged. The two sentences of 5 years, having both been served, are not considered here.

7. The excessive portion of the life sentence is severable from the proper portion of that sentence. Accordingly, only that excessive portion of the sentence is void. The valid portion of that sentence has not expired.

8. The Petitioner is not presently in custody in violation of any right guaranteed him by the Constitution of the United States and is not being illegally restrained of his liberty.

Counsel for respondent is directed to prepare an Order directing that the Writ of Habeas Corpus be discharged, the petition herein dismissed and the petitioner remanded to the custody of Respondent as provided by Local Rule 22.

DATED at Topeka, Kansas this 17th day of February, 1965.

/s/ George Templar
United States District Judge

APPENDIX C

United States Constitution, Amendment XIV

§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Kansas Statutes Annotated

21-107a. Second or third conviction; penalties. Every person convicted a second time of felony, the punishment of which is confinement in the penitentiary, shall be confined in the penitentiary not less than double the penalty of the second conviction; and if convicted a third time of felony, he shall be confined in the penitentiary for a period of not less than fifteen years. Judgment in such cases shall not be given for the increased penalty, unless the court shall find, from the record and other competent evidence, the fact of former convictions for felony committed by the prisoner, in or out of this state. [L. 1927, ch. 191, § 1; L. 1939, ch. 178, § 1.]

21 Oklahoma Statutes Annotated

§ 801. Robbery or attempted robbery with dangerous weapon—Punishment

Any person or persons who, with the use of any firearms or any other dangerous weapons, attempts to rob or robs any person or persons, or who robs or attempts to rob any place of business, residence or banking institution or any other place inhabited or attended by any person or persons at any time, either day or night, shall be guilty of a felony, and, upon conviction therefor, shall suffer

punishment by death, or imprisonment, at hard labor, in the State Penitentiary, for a period of time of not less than five years, at the discretion of the Court, or the jury trying the same. Laws 1923, ch. 85, p. 150, § 1; Laws 1925, ch. 44, p. 71, § 1.

22 Oklahoma Statutes Annotated

§ 464. Counsel, right to before arraignment

If the defendant appear for arraignment, without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desire the aid of counsel. If he desires, and is unable to employ counsel, the court must assign counsel to defend him. (R.L.1910, § 5773.)

APPENDIX D

Page 216

Criminal Appearance Docket, County Court No. 12, Pawnee County, Oklahoma

Number 7326	Nature of Action	Attorneys
	Robbery with Fire Arms	Prentiss E. Rowe

Title of Case

STATE OF OKLAHOMA

Plaintiff

vs.

Arlay Cleaburn Browning

and

Jack J. Snyder

Defendants

1950

Apr. 10	To F. Complaint, Docket and Index	2.10
Apr. 10	Deft each present in Court in person, complaint read by Co. Atty. Rowe, duly advised	

of their rights and each personally waive their preliminary hearing. Bond fixed in amt. of $25,000.00 at recommendation of Co. Atty, for their appearance Apr. 17, 1950 in District Court. .10

Page 151

Criminal Appearance Docket, District Court No. 5, Pawnee County, Oklahoma

Number 2204	Nature of Action	Attorneys
	Robbery with Fire Arms	Prentiss E. Rowe

Title of Case

STATE OF OKLAHOMA
Plaintiff

vs.

Arley Cleaburn Browning
and
Jack J. Snyder
Defendant

1950			
April 10	To F. Transcript, Docket and Index	2.10	Co. Cost
April 17	To F. Information-Seal — 2 copies	.55	2.20
April 17	Deft each present in Court in person, duly arraigned and advised of their rights and each enter his plea of not guilty. Bond set in amt. of $5000.00 each for their appearance Apr. 24, 1950	.10	

* * *

May	22	Deft Browning present in Court in person and changes his plea of not guilty heretofore entered to a plea of guilty—Jdg. of the Court that deft. serve 10 years in State Pen. at McAlester	.10	Parole fund 1.00

* * *

1957

Oct.	22	To F. Application for Writ of Error Coram Nobis	.10
Oct.	22	To F. Demurrer	.10

Court Minutes of Record in District Court Journal No. 36, District Court, Pawnee County, Oklahoma

April 17, 1950 Page 632

2204—State of Okla. vs. Arley Cleaburn Browning and Jack J. Snyder.

And now on this 17 day of April, 1950, Deft. each present in Court in person, duly arraigned and advised of their rights and each enter his plea of not guilty. Bond set in am'T of $15,-000.00 each, for their appearance Apr. 24, 1950.

* * *

May 22, 1950 Page 640

2204 State of Okla. vs. Arley Cleaburn Browning.

And now on this 22 day of May, 1950, Deft. present in Court in person and changes his plea of not guilty, heretofore entered to a plea of guilty—Judg. of the Court that Deft. Serve 10 years in State Pen, at McAlester.

* * *

STATE OF OKLAHOMA No. 2204

SS

PAWNEE COUNTY

In the District Court of the 21st Judicial District of the State of Oklahoma, sitting in and for Pawnee County.

Judgment and Sentence on Robbery with Firearms

STATE OF OKLAHOMA

Plaintiff

vs

Arley Cleaburn Browning

Defendant

The prisoner Arley Cleaburn Browning being personally present in open court and having been legally informed against and arraigned and having pleaded guilty to the crime of Robbery with Firearms charged in said information and having been then and there in said court duly and legally tried and convicted of said crime and upon being asked by the court whether he had any legal cause to show why judgment and sentence should not be pronounced against him at this time and having no good reason why it should not be pronounced against him and none appearing to the court does now hereby adjudge and sentence the said Arley Cleaburn Browning to be imprisoned in the state penitentiary at hard labor for the period of ten years for the offense.

IT IS THEREFORE HEREBY CONSIDERED, AND ADJUDGED by the Court that the said Arley Cleaburn Browning who upon his oath in open court states his age to be 24 years, be committed to be imprisoned in the state Penitentiary at McAlester in the state of Oklahoma and confined in said Penitentiary for the term of ten years

for said offence of Robbery of Firearms said term of sentence to begin at and from the date of his delivery to the warden of said penitentiary and that said defendant pay the costs of this prosecution, taxed at $106.25 for which judgment is hereby rendered against the said defendant; and thereupon the court notified the defendant of his right of appeal.

IT IS FURTHER ORDERED AND ADJUDGED by the Court that the Sheriff of Pawnee County, State of Oklahoma, transport said Arley Cleaburn Browning to the said state Penitentiary at McAlester in the state of Oklahoma, and that the warden of said Penitentiary do detain the said Arley Cleaburn Browning according to this judgment, sentence and order; and that the clerk of this court do immediately certify, under the seal of the Court and deliver to the Sheriff of Pawnee County, State of Oklahoma, a copy of this judgment, sentence and order, to accompany the body of the said Arley Cleaburn Browning to the said Penitentiary at McAlester in the State of Oklahoma and to be left therewith at the said Penitentiary and the said copy to be the warrant and authority of the said Sheriff of Pawnee County, State of Oklahoma, for transportation and imprisonment of the said Arley Cleaburn Browning as hereinbefore provided.

Done in open Court May 22, 1950

Horace D. Ballaine
Judge

APPENDIX E

Affidavit

STATE OF OKLAHOMA)
SS:
COUNTY OF TULSA)

HORACE D. BALLAINE, of lawful age, being first duly sworn, upon oath says:

During the period from January, 1947, to July, 1951, I was one of the District Judges of the 14th Judicial District of the State of Oklahoma, which includes Tulsa and Pawnee Counties. I have been informed that the records disclose that during the month of May, 1950, I imposed sentence upon one Arley C. Browning in Pawnee County, Oklahoma, upon his plea of guilty to a charge of armed robbery and that Mr. Browning alleges that he was not informed of his rights to counsel before entering his plea.

I have no independent recollection of having sentenced Mr. Browning. However, upon the arraignment of persons charged with crime it was my invariable practice to advise the accused of the crime with which he was charged and to inquire whether or not he had counsel. If he replied that he did not have counsel I would advise him of his right to counsel and if he was without funds to employ counsel I would appoint counsel to represent him. If, after being so advised, the defendant appeared to be competent to waive his right and he stated that he did not desire counsel I would permit him to plead guilty or not guilty as he chose.

As I said above, I have no independent recollection of Mr. Browning's case. It is my opinion, however, that I did advise him of his right to counsel for I can remember no case in which I did not follow such procedure.

/s/ Horace D. Ballaine

SUBSCRIBED and sworn to before me this 30th day of April, 1963.

/s/ Edith C. Cinocca

(Seal) Notary Public

My Commission expires: January 24, 1966.